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The 1990 Independent Safety Board Act Amendments

Craig M. Blitzer

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THE 1990 INDEPENDENT SAFETY BOARD ACT AMENDMENTS

CRAIG M. BLITZER*

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I. INTRODUCTION

THE BUDGET CRISIS of 1990 will soon be forgotten by most people. Hopefully, fears of potential government shut-downs will remain a creature of the past. While the crisis and its issues may be long gone, there remains the aftermath of certain legislation that undoubtedly will have a far greater effect than Congress ever could have imagined. This legislation is the Independent Safety Board Act Amendments of 1990¹ (1990 Amendments).

What would appear to be a simple re-appropriations bill,² in reality, is quite more. Although this Comment agrees that the National Transportation Safety Board (NTSB) was in desperate

* The author worked as a summer intern for the Justice Department during the summer of 1993. The views expressed in this Comment are those of the author. This Comment in no way represents or attempts to represent the views of the United States Department of Justice.

Special thanks to Wendy L. Rome, Trial Attorney, U.S. Department of Justice, Civil Division, Torts Branch, Aviation Admiralty Litigation, Washington, D.C.

¹ 49 U.S.C. app. § 1905 (Supp. V 1993).

² S. REP. NO. 450, 101st Cong., 2d Sess. (1990). "The legislation, as reported, would amend certain provisions in the Independent Safety Board Act of 1974 (Safety Board Act) and authorize \$32 million, \$38.6 million, and \$38.8 million

need of new funding,³ the 1990 Amendments, as adopted, raise First Amendment issues, drastically limit pre-trial discovery of cockpit voice recorder recordings and transcripts, raise Freedom of Information Act questions, and may possibly have the effect of stilling the public's voice to Congress regarding concerns about air safety.

II. LEGISLATIVE HISTORY

In 1966, Congress determined that the creation of a Department of Transportation was necessary for the welfare of the nation, and enacted the Department of Transportation Act.⁴ Transportation, even in 1966, was big business;⁵ as President Lyndon Johnson, observed "[i]n a nation that spans a continent, transportation is the web of union."⁶ The NTSB was created as a

for the activities of the National Transportation Safety Board (NTSB) for fiscal year (FY) 1991, 1992, and 1993, respectively." *Id.* at 1.

³ H.R. REP. NO. 661, 101st Cong., 2d Sess., pt. 1, at 3-4 (1990).

The reported bill is designed to reverse the unfortunate reductions in the Board's staff and capabilities which occurred during the 1980's. In 1980, the Board had a staff of 400. By 1982 unnecessary cuts in funding had reduced the Board's staff by 27 percent. Since that time, the Board has been able to regain some of its lost staff but its current staff level of 326 is well below the level of 1980 and below the level which the Committee believes necessary for the Board to carry out its important safety responsibilities. The budget cuts which the Board has sustained have resulted in a substantial increase in the time required for the Board to issue accident reports and a decline in the number of the accidents the Board has been able to investigate. The budget cuts have also caused the Board to lose staff in key technical areas.

Id.

⁴ Department of Transportation Act, Pub. L. No. 89-670, § 2, 80 Stat. 931 (1966).

The Congress hereby declares that the general welfare, the economic growth and stability of the Nation and its security require the development of national transportation policies and programs conducive to the provision of fast, safe, efficient, and convenient transportation The Congress therefore finds that the establishment of a Department of Transportation is necessary in the public interest and to assure the coordinated, effective administration of the transportation programs of the federal government. . . .

Id.

⁵ H.R. DOC. NO. 399, 89th Cong., 2d Sess. (1966). Transportation in 1966 accounted for one-sixth of the gross national product and was one of the largest sources of employment. There were 737,000 railroad employees, 270,000 local and interurban workers, 230,000 in air transport and almost 1 million in motor transport and storage. *Id.*

⁶ *Id.*

result of the Department of Transportation Act,⁷ and the NTSB eventually assumed the duties of the Civil Aeronautics Board (CAB), which was abolished when the airline industry was deregulated.⁸ The legislative history is indicative of the congressional intent that the NTSB be an integral part of accident investigations. Some duties of the new board included:

[D]etermining the course or probable course of transportation accidents and reporting the facts, conditions, and circumstances relating to such accidents. . . . conduct[ing] special studies pertaining to safety in transportation and the prevention of accidents. . . . mak[ing] recommendations to the Secretary of Administrators concerning rules, regulations, and procedures for the conduct of accident investigations.⁹

Almost ten years after Congress enacted the Department of Transportation Act, Congress enacted the Transportation Safety Act of 1974. In doing so, Congress made the NTSB an entity that would be completely separate from the Department of Transportation or any other federal agency.¹⁰ The NTSB, effective April 1, 1975, became an independent agency of the United States.¹¹ Congress's rationale for making the NTSB an independent agency was articulated in their findings upon enacting the Transportation Safety Act of 1974.¹²

⁷ Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (1966).

⁸ Department of Transportation Act, Pub. L. No. 95-504, 92 Stat. 1744 (1984). "All functions, powers, and duties of the Civil Aeronautics Board were terminated or transferred by Pub. L. 95-504, § 40(a), Oct. 24, 1978, 92 Stat. 1744, effective on or before Jan. 1 1985."

⁹ Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, § 3(c)(4)(E), 98 Stat. 1703, 1704 (1984).

¹⁰ 49 U.S.C. app. § 1901 (1988).

¹¹ 49 U.S.C. app. § 1902 (1988).

¹² 49 U.S.C. app. § 1901 (1988).

Proper conduct of the responsibilities assigned to this Board requires vigorous investigation of accidents involving transportation modes regulated by other agencies of Government; demands continual review, appraisal, and assessment of the operating practices and regulations of all such agencies; and calls for the making of conclusions and recommendations that may be critical of or adverse to any such agency or its officials. No Federal agency can properly perform such functions unless it is totally separate and independent from any other department, bureau, commission, or agency of the United States.

Id. § 1901(2).

When the NTSB was originally created,¹³ there were no limitations on the use of cockpit voice recorders (CVRs).¹⁴ CVRs record communications between the flight crew themselves and between the flight crew and ground stations.¹⁵

In 1982, Congress amended the portion of the statute pertaining to the dissemination of CVR recordings and transcripts.¹⁶ The new amendment gave the NTSB up to sixty days¹⁷ to release CVR transcripts and was intended to enable the NTSB to withhold the actual recordings.¹⁸

III. The 1990 AMENDMENTS

On October 27, 1990, Congress passed the Independent Safety Board Act Amendments of 1990 (1990 Amendments). The 1982 Amendments,¹⁹ which provided the NTSB with a sixty day window to release relevant portions of the CVR transcripts, had been retracted.²⁰

An air carrier²¹ holding an operating certificate is required to equip its aircraft with a CVR.²² Because the CVR is an endless

¹³ Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (1966).

¹⁴ 49 U.S.C. app. § 1905 (1988).

¹⁵ A CVR is frequently confused with the "black box." While the "black box" is an equally important device in determining the probable cause of aircraft crashes, it serves a different function than the cockpit voice recorder. The "black box" records information such as engine settings and the positions of various flight control surfaces. The cockpit voice recorder consists of an endless loop tape thirty minutes in duration and may record from a variety of different sources.

¹⁶ Aviation Insurance Program, Pub. L. No. 97-309, 96 Stat. 1453 (1982).

¹⁷ *Id.*

¹⁸ 49 U.S.C. app. § 1905 (Supp. V 1993).

¹⁹ *See id.* and accompanying text.

²⁰ *See* Letter from Jim Burnett, Member of the Nat'l Transp. Safety Bd. to the Hon. James L. Oberstar, United States Senator, Chairman of the Subcomm. on Aviation, Comm. on Public Works and Transp. (May 21, 1990) (on file with the *University of Arkansas Law Review*). Jim Burnett served as chairman of the NTSB and as a member for a total of nine years. Mr. Burnett was a member of the NTSB at the time the 1990 Amendments were passed. Mr. Burnett had dissented from his four colleagues; the chairman, vice-chairman, and two other members.

²¹ Air carrier is defined as "a person who undertakes directly by lease, or other arrangement, to engage in air transportation." 14 C.F.R. § 11 (1995). Air transportation is defined as "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." *Id.*

²² 14 C.F.R. § 91.609(a) (1995) provides:

No holder of an air carrier operating certificate or an operating certificate may conduct any operation under this part with an aircraft listed in the holder's operations specifications or current list of aircraft used in air transportation unless that aircraft complies

loop tape, the CVR will begin to record over itself after the first thirty minutes. Thus, the thirty-first minute of recording time will replace what was initially the first minute of the recording. The CVR records from a multitude of inputs and must meet strict requirements.²³

The history surrounding the new legislation restricting discovery of the CVR recordings or transcripts stems considerably from The Air Line Pilots Association International's²⁴ (ALPA) desire to protect the privacy of the cockpit crew members.²⁵ On May 10, 1990, the Senate Subcommittee on Aviation held hearings on the reauthorization of the National Transportation Safety Board.²⁶ Present at those hearings were the Honorable James L. Kolstad, chairman of the NTSB, and Mr. Henry Duffy, then president of ALPA.²⁷ Both men expressed concern over the "premature release" of CVR recordings and transcripts.²⁸ Mr. Duffy cited two specific incidents of misuse by the media and the courts involving the release of CVR transcripts or recordings. The first involved a Northwest Air Lines accident in Detroit in August of 1987, and the second accident involved a Delta Air Lines crash in Dallas in 1988.²⁹ Mr. Duffy also noted that since the inception of CVRs in commercial aircraft:

with any applicable flight recorder and cockpit voice recorder requirements of the part under which its certificate is issued

²³ 14 C.F.R. § 23.1457 (1995). The CVR is required to record all voice communications and must meet strict requirements with regard to construction, installation, and operation. *Id.* See also 14 C.F.R. § 135.151 (1991), 14 C.F.R. § 127.127 (1991), 14 C.F.R. § 121.359 (1988), 14 C.F.R. § 27.1457 (1988), 14 C.F.R. § 125.227 (1988), 14 C.F.R. § 29.1457 (1970).

²⁴ "ALPA is the duly recognized collective bargaining representative of the pilot employees of many commercial air carriers . . . pursuant to the Railway Labor Act, 45 U.S.C. 151, *et seq.*" Memorandum of Air Line Pilots Association International as *Amicus Curiae* in Support of Defendant's Motion for Summary Judgment at 2, *McGivra v. National Transp. Safety Bd.*, 840 F. Supp. 100 (D. Colo. 1992).

²⁵ According to ALPA President Duffy: "The principal reason for the requirement [of the CVR] was to glean information regarding the flight crew's communications in the cockpit immediately before a crash. CVRs were particularly important in . . . cases where the crew did not survive." *The Reauthorization of the Nat'l Transp. Safety Bd.: Hearing Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Sci., and Transp.*, 101st Cong., 2d Sess. 36 (1990).

²⁶ *Id.*

²⁷ ALPA is the largest union for airline pilots. At the time of the hearings, ALPA represented over 42,000 pilots from over 50 airlines in this country. *Id.* (statement of Henry Duffy, president of ALPA).

²⁸ *Id.* at 37 (statements of Honorable James L. Kolstad, Chairman, NTSB and Henry Duffy, president of ALPA).

²⁹ *Id.*

it [has been] recognized by all of the interested parties that CVRs were an unprecedented intrusion into the workplace and an invasion of personal privacy. These concerns were outweighed, however, by the need for information from the flight crew in order to determine the cause of the accident so future occurrences could be prevented.³⁰

Mr. Duffy further pointed out that since "the enactment of the Freedom of Information Act and the increased media interest in aircraft accidents, the promised protections for CVR information began to erode. . . . CVR transcripts began appearing in the news media which resulted in premature speculation and misinformation as to the cause of the accident."³¹ Mr. Duffy stated that "[t]he penchant for sensationalism by the press resulted in the misleading focus by the news media on the nonpertinent conversations rather than the air safety factors associated with the accident."³²

Unquestionably, Mr. Duffy raised compelling concerns, but what price has the public paid for this new legislation? While the intent of the legislation was to limit discovery of the CVR to relevant portions of the recording or transcript, the new statute has much farther reaching effects.³³

An accident is defined as "an occurrence associated with the operation of an aircraft³⁴ which takes place between the time any person boards the aircraft with the intention of flight and all such persons having disembarked, and in which any person suffers death or serious injury,³⁵ or in which the aircraft receives substantial damage."³⁶ An incident is defined as "an occurrence

³⁰ *Id.* at 36.

³¹ *Id.*

³² *Id.* at 37.

³³ 49 U.S.C. app. § 1905 (Supp. V 1993).

³⁴ 14 C.F.R. § 1.1 (1995). Aircraft is defined as "a device that is used or intended to be used for flight in the air." *Id.*

³⁵ 49 C.F.R. § 830.2 (1995) defines serious injury as any injury that:

(1) Requires hospitalization for more than 48 hours, commencing within 7 days from the date of the injury was received; (2) results in a fracture of any bone (except simple fractures of fingers, toes, or nose); (3) causes severe hemorrhages, nerve, muscle, or tendon damage; (4) involves any internal organ; or (5) involves second- or third-degree burns, or any burns affecting more than 5 percent of the body surface.

49 C.F.R. § 830.2 (1995) defines fatal injury as "any injury which results in death within 30 days of the accident."

³⁶ 49 C.F.R. § 830.2 (1995) defines substantial damage as:

other than an accident, associated with the operation of an aircraft, which affects or could affect the safety of operations.”³⁷

A. DISCOVERY RULES

There are several problems the 1990 Amendments³⁸ pose to a litigant who is trying to obtain discovery of CVR recordings or transcripts. Rule 26 of the Federal Rules of Civil Procedure provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.³⁹

Despite the very broad language of Rule 26, Congress has the authority to require a greater showing before certain materials are allowed to be discovered. This is most clearly illustrated in Rule 35 of the Federal Rules of Civil Procedure, which pertains to physical and mental examinations of persons.⁴⁰ Unlike the broad language in Rule 26, Rule 35 can only be invoked upon a showing of “good cause.”⁴¹

While language used by Congress in the 1990 Amendments is clear, there are some practical obstacles facing a litigant seeking discovery. Initially, discovery is available for “portions of a transcription of oral communications . . . which the [NTSB] determines relevant and pertinent to the accident or incident

damage or failure which adversely affects the structural strength, performance, or flight characteristics of the aircraft, and which would normally require major repair or replacement of the affected component. Engine failure or damage limited to an engine if only one engine fails or is damaged, bent fairings or cowling, dented skin, small punctured holes in the skin or fabric, ground damage to rotor or propeller blades, and damage to landing gear, wheels, tires, flaps, engine accessories, brakes, or wingtips are not considered “substantial damage” for the purpose of this part.

³⁷ *Id.*

³⁸ 49 U.S.C. app. § 1905 (Supp. V 1993).

³⁹ FED. R. CIV. P. 26.

⁴⁰ FED. R. CIV. P. 35.

⁴¹ *Id.*

...⁴² This leaves complete authority in the NTSB to determine what portions of the CVR recording are relevant. Because much of the probable cause determination relies on theories and speculation, it is easy to see why a determination of relevance would be difficult for anyone. Judging from its lack of consistency in this area, the NTSB is no exception. The crash of Delta flight 1141⁴³ is a primary example.

When the probable cause report pertaining to the crash of Delta flight 1141 was released by the NTSB, nowhere did the report mention birds as a contributing factor to, or as a probable cause of, the crash.⁴⁴ If birds were in no way relevant to the crash, why had the conversation about egrets and gooney birds (albatrosses) not been redacted from the transcripts of the CVR?⁴⁵ While apparently non-relevant discussion about egrets and gooney birds remained in the transcripts of Delta flight

⁴² 49 U.S.C. app. § 1905(C)(2) (Supp. V 1993).

⁴³ There was no litigation involving liability relating to the crash of Delta flight 1141. The only issues were those involving damages which were all sealed in accordance with settlement agreements. Telephone Interview with Jerry Mayo, Legal Counsel for Delta Airlines, Inc. (Nov. 18, 1993).

⁴⁴ The National Transportation Safety Board lists the probable cause of the crash of Delta flight 1141 to be as follows:

The National Transportation Safety Board determines that the probable cause of this accident to be (1) the Captain and First Officer's inadequate cockpit discipline which resulted in the flight crew's attempt to takeoff without the wingflaps and slats properly configured; and (2) the failure of the takeoff configuration warning system to alert the crew that the airplane was not properly configured for the takeoff.

Contributing to the accident was Delta's slow implementation of necessary modifications to its operating procedures, manuals, checklists, training, and crew checking programs, which were necessitated by significant changes in the airline following rapid growth and merger.

Also contributing to the accident was the lack of sufficiently aggressive action by the FAA to have known deficiencies corrected by Delta and the lack of sufficient accountability within the FAA's air carrier inspection process.

Nat'l Transp. Safety Bd. Aviation Accident Report 89/04 Delta Airlines, Inc. Boeing 727-232, N473DA Dallas-Fort Worth Int'l Airport, Tex., Aug. 31, 1988, at 94 (1989).

⁴⁵ *Id.* The following are excerpts from the transcription of the CVR aboard Delta flight 1141:

INTRA-COCKPIT

CAM-1 - voice identified as Captain

CAM-2 - voice identified as First Officer

CAM-3 - voice identified as Flight Engineer

CAM-4 - voice identified as Flight attendant in cockpit

1141, it is unclear why ten minutes and twenty seconds of conversation between the flight crew and a flight attendant would be excluded from a thirty minute recording. This conversation was excluded as non-relevant despite the fact that the NTSB, in

<u>TIME & SOURCE</u>	<u>CONTENT</u>
0835:31	
CAM-1	how about lookin' down here at Delta's now and then
CAM	((sound of laugh))
CAM-?	yeah *
0835:48	
CAM-3	how about lookin' down here while we still have our teeth in our mouths
0835:35	
CAM-1	what's that
0835:52	how about lookin' down our way while we still have our
CAM-3	teeth in our mouths
0835:35	
CAM	((sound of laugh))
0835:57	
CAM-2	growing gray at the south ramp is delta
0839:40	
CAM-3	yeah big push
0847:28	((7 minutes and 42 seconds of non-pertinent conversation between the flight crews and a flight attendant))
CAM-1	don't we have to change to ground here
0847:30	
CAM-2	yeah I'm sorry I'm sittin' here talking to the flight attendant
0848:12	
CAM-1	okay
0850:01	((1 minute and 18 seconds of non-pertinent conversation between the flight crew and flight attendant))
CAM-4	are we gunna get takeoff or are we just gunna roll around the airport
0850:34	
CAM-1	once they're all gone we can go
0853:12	((1 minute and 22 seconds of non-pertinent conversation between the flight crew and a flight attendant))
CAM-2	what kinda birds are those
0853:16	
CAM-1	Egrets or what ever they call 'em
0853:18	
CAM-4	yeah Egrets
0856:09	
CAM-2	ever go out to Midway and see the gooney birds they're somethin' to watch
0856:15	
CAM-3	they crash and look around to see if any body saw 'em you know.

its findings, made reference to the excessive amount of time the flight attendant spent in the cockpit of Delta flight 1141.⁴⁶ The NTSB has apparently not been utilizing "strict relevance" as its sole criterion for redaction of the CVR recording. Apparently the NTSB believed that conversation about egrets and gooney birds was relevant because this portion of the recording remained while ten minutes and twenty seconds of the recording between the flight crew and a flight attendant was not relevant because it was removed from the transcripts.⁴⁷

While the intent of the 1990 Amendments was to keep non-relevant portions of the recordings and transcripts from the public,⁴⁸ it presumes that the NTSB will know what is relevant and what is not relevant to the issues being litigated. This Comment does not imply that the NTSB is not qualified for the role that it has been assigned. The NTSB investigation teams, known as "go-teams," are made up of experts, whose roles are to determine the probable cause of aircraft accidents or incidents.⁴⁹ A "legal group" is not dispatched with the other "go-team" groups because a "legal group" does not exist.⁵⁰ But what might not be relevant to the NTSB's determination of probable cause, might be extremely relevant in the legal determination of negligence or liability. A comment by a pilot may appear to the NTSB to be casual conversation unrelated and not relevant to the accident.⁵¹ Yet in reality, an inspection of the pilot's comment by opposing counsel may reveal information relative to a finding of negligence or liability.⁵²

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 49 U.S.C. app. § 1905 (Supp. V 1993).

⁴⁹ Letter from NTSB to the press regarding investigative functions of Go-Teams (on file with the *University of Arkansas Law Review*).

⁵⁰ *Id.*

⁵¹ There is an NTSB go-team known as the "human factors group." This team may investigate the possibility of any emotional factors that any of the pilots may have been experiencing that might help to determine the probable cause of the crash. See *infra* note 60.

⁵² While this Comment does address the following issue, it is possible that constitutional implications regarding separation of powers may be raised by the statute. Rule 26 of the Federal Rules of Civil Procedure gives to the courts the authority to determine what is and what is not relevant for the purposes of discovery. Under the statute, this function is not being performed by the judiciary, it is being performed by an independent agency.

To further compound the problem, because the CVR is the property of the person whose airplane⁵³ crashed, that party will have access to the entire CVR recording. This may be used to the owner's advantage. The owner of the CVR recording now may have the opportunity to "hide behind" parts of the CVR recording that were either overlooked, misunderstood, misinterpreted, or are otherwise unintelligible to the NTSB investigators.⁵⁴ Conversely, if part of the recording is detrimental to another litigant, the party owning the CVR recording may "leak" this information in an attempt to persuade the NTSB of its relevance. The 1990 Amendments provide for discovery following an in camera review by the court of those portions of the transcripts which the NTSB has previously deemed non-relevant.⁵⁵ The potential problem this raises is that litigants will be forced to argue their motions to the court in the abstract. Counsel will inevitably have to try to persuade the court that the NTSB's determination of relevance is based on an accident context, and not a legal context. This still will not avoid the "in the dark" argument that accompanies most requests for discovery involving in camera interviews. The party seeking discovery of the transcripts may have difficulty effectuating discovery in some courts given the express language of the statute.⁵⁶

What is most disturbing about the 1990 Amendments is that while Congress charges the NTSB with the initial determination of relevance, Congress has forbidden the NTSB's probable cause findings to be used in litigation.⁵⁷ The statutory language is clear: "No cockpit voice recorder transcriptions prepared by or under the direction of the board, under subsection (C) of this section, shall be required to be produced for an in camera review, or shall be subject to discovery, unless the cockpit voice

⁵³ 14 C.F.R. § 1.1 (1995) defines airplane as "an engine-driven fixed-wing aircraft heavier than air, that is supported in flight by the dynamic reaction of the air against its wings." The CVR is the property of the aircraft owner and nothing in the statute restricts the CVR recording from being returned to its rightful owner. 49 U.S.C. app. § 1905 (Supp. V 1993).

⁵⁴ An example of such communication that is not in accordance with Federal Aviation Administration Regulations (FARS) is a type of jargon being used by pilots based on their home states, upbringing, or cultural backgrounds. Such communication may, however, convey a specific meaning among the members of the flight crew regarding performance of their duties or reference to the configuration or performance of the aircraft.

⁵⁵ 49 U.S.C. app. § 1905 (Supp. V 1993).

⁵⁶ *Id.*

⁵⁷ *Id.*

recorder recordings are not available."⁵⁸ While the NTSB under the 1990 Amendments⁵⁹ is far from the final authority on the subject, Congress should not have involved an independent agency whose purpose is to determine the probable cause of accidents,⁶⁰ and then unquestionably exclude those reports from future litigation.

The discovery provisions of the 1990 Amendments have yet to be tested in appellate courts. There is, however, pending litigation that has arisen from the United Airlines flight 585 crash.⁶¹ In that action, the judge issued an order that the litigants be able to hear the cockpit voice recording in accordance with a provision of the 1990 Amendments.⁶² The judge, also in accordance with the statute, held that he would issue a protective order

⁵⁸ *Id.* § 1905(d)(2).

⁵⁹ *Id.*

⁶⁰ 49 U.S.C. app. § 1903 (1988 & Supp. V 1993) provides that the NTSB shall: (1) investigate or cause to be investigated (in such detail as it shall prescribe), and determine the facts, conditions, and circumstances and the cause or probable cause or causes of any—(A) aircraft accident which is within the scope of the functions, powers, and duties transferred from the Civil Aeronautics Board under section 1655(d) of this Appendix pursuant to title VII of the Federal Aviation Act of 1958, as amended

Id.

⁶¹ Nat'l Transp. Safety Bd. Aircraft Accident Report 92/06, United Airlines Flight 585 Boeing 737-291, N999UA, Uncontrolled Collision With Terrain For Undetermined Reasons 4 Miles South Of Colorado Springs Municipal Airport, Colorado Springs, Colo., Mar. 3, 1991 (1992). United flight 585 crashed on March 31, 1991, and the NTSB report reads as follows:

The National Transportation Safety Board, after an exhaustive investigation effort, could not identify conclusive evidence to explain the loss of United Airlines flight 585. The two most likely events that could have resulted in a sudden uncontrollable lateral upset are a malfunction of the airplane's lateral or directional control system or an encounter with an unusually severe atmospheric disturbance. Although anomalies were identified in the airplane's rudder control system, none would have produced a rudder movement that could not have been easily countered by the airplane's lateral controls. The most likely atmospheric disturbance to produce an uncontrollable rolling moment was a rotor (a horizontal axis vortex) produced by a combination of high winds aloft and the mountainous terrain. Conditions were conducive to the formation of a rotor, and some witness observations support the existence of a rotor at or near the time and place of the accident. However, too little is known about the characteristics of such rotors to conclude decisively whether they were a factor in this accident.

Id.

⁶² *Van Handel v. United Airlines*, 91L09639 (Cook Co. Cir. Ill., Mar. 11, 1993) (order on file with the *University of Arkansas Law Review*).

"to limit the use of the recording to this judicial proceeding and to prohibit dissemination to anyone (other than an expert retained by the attorneys to listen and consult), unless and until further order of [c]ourt."⁶³

This protective order raises several significant issues. It may prevent the public from voicing its opinion to Congress because of the public's lack of information regarding the crash. Full disclosure of the recording or transcript is necessary for the public to democratically control air travel through their government, a government which in turn directly regulates air travel.

Non-disclosure regarding an aviation disaster is analogous to settlement agreements between corporations and plaintiffs whereby all parties are required to keep certain information confidential. Similar problems can be expected to arise in both contexts. These types of settlements "often contain confidentiality provisions similar to those found in . . . protective orders and prohibit the litigants from disclosing documents relating to the settlement"⁶⁴

The problem of non-disclosure has been addressed by both the courts and the press. The United States District Court for the District of New Jersey, in *Cipollone v. Liggett Group, Inc.*,⁶⁵ stated that "[i]t is inconceivable to this court that . . . the public interest is not a vital factor to be considered in determining whether to further conceal that information and whether a court should be a party to that concealment."⁶⁶ The United States District Court for the Northern District of Illinois, in *Culinary Foods, Inc. v. Raychem Corp.*,⁶⁷ added that "[w]here products are indeed hazardous, information concerning the dangers of the products and the corporation['s] lack of action to prevent the dangers or its attempt to conceal the dangers should not be subject to protection under [Federal Rules of Civil Procedure] Rule 26(c)."⁶⁸ An article in the *Washington Post*, regarding confidential settlements between General Motors and several plaintiffs, stated:

⁶³ *Id.*

⁶⁴ John J. Watkins, *Expanding The Public's Right To Know, Access to Settlement Records Under the First Amendment*, in PRESS, POLITICS, PUBLIC POLICY 2 (The Joan Shorenstein Parone Center Discussion Paper D-7, 1990).

⁶⁵ 113 F.R.D. 86 (D.N.J. 1986), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987).

⁶⁶ *Id.* at 87.

⁶⁷ 151 F.R.D. 297 (N.D. Ill.), *order clarified by* 153 F.R.D. 614 (N.D. Ill. 1993).

⁶⁸ *Id.* at 301.

[i]n case after case, GM has turned over documents to opposing lawyers only under court-imposed confidentiality orders that prohibit disclosure to anyone else. It has paid millions of dollars to settle cases before trial and, as part of those settlements, has obtained agreements that bar opposing lawyers from discussing what they learned about GM. And in two cases, it has asked judges to punish lawyers who allegedly violated confidentiality orders.⁶⁹

The airline industry is one of the most regulated industries in the United States. Given the tremendous number of people who travel,⁷⁰ there could be little debate over the need for this regulation.

B. FREEDOM OF INFORMATION ACT IMPLICATIONS

Because the information to which the public is entitled access is in the possession of a federal agency, the Freedom of Information Act (FOIA) is applicable.⁷¹ FOIA in part provides that each agency shall make the following information available to the public by publishing it in the Federal Register:

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.⁷²

⁶⁹ See Watkins *supra* note 64, at 3 (quoting Elsa Walsh & Benjamin Weiser, *Public Courts, Private Justice*, WASH. POST NAT'L WKLY. ED., Nov. 28, 1988, at 6).

⁷⁰ According to the U.S. Department of Commerce, more than 450 million passengers travelled by plane in 1991, compared with approximately 319 billion in 1983. BUREAU OF THE CENSUS, U.S. DEPT. OF COM., STATISTICAL ABSTRACT OF THE U.S. 635 (113th ed. 1993).

⁷¹ 5 U.S.C. § 552 (1994).

⁷² *Id.* § 522(a)(1).

In accordance with this provision, the NTSB makes its records⁷³ available to the public. But Congress specifically exempts certain information from FOIA in section 552(b).⁷⁴ Sec-

⁷³ See 49 C.F.R. § 801.2 (1995). Records include "any writing, drawing, map, recording, tape, film, photo, or other documentary material by which information is preserved, and this definition also applies to section 306(a) of the Independent Safety Board Act of 1974, which requires public access to any information." *Id.* § 801.3.

⁷⁴ Section 552 provides that it does not apply to matters that are:

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency re-

tion 552(b)(3) makes it clear that FOIA will not apply to matters that are:

specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.⁷⁵

The 1990 Amendments appear clear: "notwithstanding any other provision of law, the Board shall withhold from public disclosure cockpit voice recorder recordings and transcriptions, in whole or part, of oral communications by and between flight crew members and ground stations, that are associated with accidents or incidents investigated by the Board."⁷⁶ However, the language of the statute may not be so clear in light of litigation in the United States District Court for the District of Colorado⁷⁷ regarding the potential applicability of FOIA's (b)(3)⁷⁸ exemption to the CVR recording. The action is against the NTSB, and the petitioner is trying to compel disclosure of the CVR from the United Airlines flight 585 crash.⁷⁹

It is ALPA's position that in addition to exemption (b)(3), exemption (b)(6)⁸⁰ also applies to the statute.⁸¹ Exemption (b)(6) pertains to "personnel and medical files and similar files[,] the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."⁸²

ALPA's supports its belief that exemption (b)(6) applies by utilizing the following rationale:

sponsible for the regulation or supervision of financial institutions;
or

(9) geological and geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552(b)(1994).

⁷⁵ *Id.* § 552(b)(3).

⁷⁶ 49 U.S.C. app. § 1905(c)(1) (Supp. II 1990).

⁷⁷ Memorandum Of Air Line Pilots Association International as *Amicus Curiae* in Support of Defendant's Motion for Summary Judgment, *McGivra v. National Transp. Safety Bd.*, 840 F. Supp. 100 (D. Colo. 1993) [hereinafter *Amicus Curiae Memorandum*].

⁷⁸ 5 U.S.C. § 552(b)(3) (1994).

⁷⁹ *Amicus Curiae Memorandum*, *supra* note 77, at 2.

⁸⁰ 5 U.S.C. § 555(b)(6)(1994).

⁸¹ In its brief to the court, the NTSB did not raise the possible applicability of exemption (b)(6) to the 1990 Safety Board Act Amendments. See *Amicus Curiae Memorandum*, *supra* note 77, at 3.

⁸² 5 U.S.C. § 552(b)(6) (1994).

[h]ere, the record at issue applies and relates directly to the pilot and co-pilot of UAL Flight 585, both of whom are "particular individuals." The U.S. Court of Appeals for the District of Columbia, in a well reasoned opinion, has determined that CVR tapes meet the "threshold" test for an Exemption 6 claim. The court, in considering whether the tape containing the conversation of the crew of the space shuttle Challenger immediately prior to its crash was a "similar file" . . . stated: "[w]e hold that the voices of the astronauts, and whatever those voices reveal of their thoughts and feelings at the very moment of their deaths, constitute 'information which applies to . . . particular individuals.'" The voices of the crew of UAL Flight 585, like those of the astronauts are information that applies to specific individuals. . . . [N]evertheless, the court must still determine if disclosure of the CVR tape would be an unwarranted invasion of privacy. This requires the Court to balance "the individual's right to privacy" against the basic policy of opening agency action to public scrutiny.⁸³

ALPA's claim that exemption (b)(6) should apply raises the issue of whether the death of the flight crew is necessary to invoke this exemption. In addition it invites the court to determine if CVR recordings can be considered personnel files. ALPA filed its brief on September 17, 1992. Since this Comment was written, the court has ruled on this case. The court held that the FOIA request was properly denied under exemption (b)(3), and therefore, did not address ALPA's argument that exemption (b)(6) also applies.⁸⁴

C. FIRST AMENDMENT ISSUES

Perhaps the most troubling foreseeable result of the 1990 Amendments is what could happen if a court allows discovery by a litigant of portions of the CVR transcript that the NTSB had determined were not relevant to the accident. The 1990 Amendments provide:

If . . . there is discovery in a judicial proceeding of a cockpit voice recorder recording or any portion of a cockpit voice recorder transcription not made available to the public under subsection (c)(2) of this section, the court shall issue a protective order to limit the use of such recording or portion to the judicial proceeding and to prohibit dissemination of such recording or portion to any person who does not need access to such recording or portion for such proceeding.

⁸³ See *Amicus Curiae Memorandum*, *supra* note 77, at 4-5 (citations omitted).

⁸⁴ *McGivra*, 840 F. Supp. at 103 n.5.

(5) A court may permit admission of a cockpit voice recorder recording or any portion of a cockpit voice recorder transcription not made available to the public under section (c)(2) of this section into evidence in a judicial proceeding, only if the court places such recording or portion under seal to preclude the use of such recording or portion for purposes other than for such proceeding.⁸⁵

This provision of the statute indicates that any portion of the recording or transcript for which the court permits discovery, despite the NTSB's finding that portion was not relevant, must be placed under seal.⁸⁶

The practical applications of this are dramatic. For example, placing a portion of the recording or transcript under seal in accordance with the statute could force the trial judge to clear the court during any period of litigation where portions of the recording or transcript under seal might be discussed. The question posed then becomes how will enforcement of the statute be achieved if the public has a First Amendment right to attend civil trials.

*Richmond Newspapers, Inc. v. Virginia*⁸⁷ was the landmark case in which a plurality of the United States Supreme Court pronounced that the public has a First Amendment right to attend criminal trials.⁸⁸ The Court began its analysis with the English common law and the openness that was associated with trials. The Court noted that "one of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial."⁸⁹ The Court further asserted that "[t]his is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial."⁹⁰ While there is no textually demonstrative right for the public to attend criminal trials, the Court determined that even though the Constitution contains no provision which by its terms guarantees to the public the right to attend criminal trials, various unarticulated rights are implicit in enu-

⁸⁵ 49 U.S.C. app. § 1905(d)(4)-(5) (Supp. II 1990).

⁸⁶ See *id.*

⁸⁷ 448 U.S. 555 (1980).

⁸⁸ *Id.* at 580.

⁸⁹ *Id.* at 566-67 (quoting EDWARD JENKS, *THE BOOK OF ENGLISH LAW* 73-74 (6th ed. 1967)).

⁹⁰ *Id.* at 569.

merated guarantees.⁹¹ For example, the rights of association and of privacy appear nowhere in the Constitution or Bill of Rights, but they have been found to share constitutional protection in common with explicit guarantees.⁹² The right to attend criminal trials is implicit in the guarantees of the First Amendments; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated.⁹³

The Court in *Richmond Newspapers* discussed practical applications of open criminal trials: "civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution."⁹⁴ The Court further noted that "[n]ot only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy."⁹⁵ Four of the seven Justices supporting the majority advanced a "functional" reason for finding a First Amendment right; that it "protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch"⁹⁶

In addition to *Richmond Newspapers*, two other cases helped lay the foundation that firmly established the public's First Amendment right to attend criminal trials. In *Globe Newspaper Co. v. Superior Court*,⁹⁷ the five member majority "len[t] further support to the functional argument for a First Amendment right of access."⁹⁸ The Supreme Court in *Press-Enterprise Co. v. Superior Court*⁹⁹ held that there is a First Amendment right to attend the voir dire of prospective jurors.¹⁰⁰

⁹¹ *Id.* at 579.

⁹² *Id.* at 579-80.

⁹³ *Id.* at 580.

⁹⁴ *Id.* at 571.

⁹⁵ *Id.* at 572 (quoting 6 JOHN H. WIGMORE, EVIDENCE § 1834, at 435, 438 (James Chadbourne rev. 1976)).

⁹⁶ *Id.* at 584.

⁹⁷ 457 U.S. 596 (1982).

⁹⁸ *In re Application of The Herald Co.*, 734 F.2d 93, 97-98 (2d Cir. 1984) (citing *Globe Newspaper*, 457 U.S. at 604-06).

⁹⁹ 464 U.S. 501 (1984).

¹⁰⁰ *Id.* at 513.

The Supreme Court has yet to hold that the public's right to access of criminal trials is absolute because "a trial judge, in the interest of the fair administration of justice, [may] impose reasonable limitations on access to a trial."¹⁰¹ In addition, the Supreme Court has yet to adopt a test that would validate the closing of a criminal trial.¹⁰² Some of the Justices have articulated what they believe to be the appropriate standard. Justice Brennan spoke about a "presumption of openness" that may be overcome only by "sufficiently compelling" interests.¹⁰³ Justice Marshall would require the defendant to show that a closure order "constitutes the least restrictive means available for protecting compelling state interests."¹⁰⁴

These standards were again articulated by the Supreme Court in *Globe Newspaper*. The Supreme Court in *Globe Newspaper* held that a Massachusetts statute¹⁰⁵ that required the trial judges to exclude the press and general public from trials for specified sexual offenses involving victims under the age of eighteen years violated the First Amendment.¹⁰⁶ The Supreme Court further held that to justify the exclusion of the press and the public from criminal trials, the state must show that closure "is necessitated by a compelling governmental interest[] and is narrowly tailored to serve that interest."¹⁰⁷ This holding serves to establish several important principles.

First, it affirms that the rule is openness and that closure is the exception.¹⁰⁸ Second, it shows that the Supreme Court is prepared to strike down statutes that institute blanket closures without reviewing the circumstances on a "case-by-case basis."¹⁰⁹ The importance of this is that:

¹⁰¹ *Richmond Newspapers*, 448 U.S. at 581 n.18.

¹⁰² *The Herald Co.*, 734 F.2d at 100 ("Until authoritatively instructed by the Supreme Court . . .").

¹⁰³ *Richmond Newspapers*, 448 U.S. at 598 (Brennan, J., concurring).

¹⁰⁴ *Press-Enterprise Co.*, 464 U.S. at 520 (Marshall, J., concurring).

¹⁰⁵ The statute in question was MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981). See *Globe Newspaper*, 457 U.S. at 598.

¹⁰⁶ *Globe Newspaper*, 457 U.S. at 610-11.

¹⁰⁷ *Id.* at 607.

¹⁰⁸ See *Press-Enterprise Co. v. Superior Ct. of Cal.*, 478 U.S. 1, 8-10 (1986). The basic test outlined by the Supreme Court in this case is "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 8 (citing *Globe Newspaper*, 457 U.S. at 605-06).

¹⁰⁹ See *Globe Newspaper*, 457 U.S. at 607-09.

[T]he same justifications support recognition of a First Amendment right of access to judicial records, which are often important to a full understanding of the issues involved and the manner in which the judicial system is functioning. Many courts have held that there is a constitutional right of access to judicial records in civil cases. For example, in *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, the U.S. Court of Appeals for the Sixth Circuit . . . [c]onclud[ed] that there is a First Amendment right of access to judicial records.¹¹⁰

In the absence of an adopted standard, the circuits have created a variety of standards which allow a criminal trial, or portions thereof, to be closed.¹¹¹ The disparity between the circuits is not that the circuits cannot seem to agree, but the differences indicate that it is the particular segment of the criminal trial that creates a variance among the tests.

D. ACCESS TO CIVIL TRIALS

While the Supreme Court has not specifically addressed the issue of whether there is a First Amendment right to attend civil trials, the Justices in *Richmond Newspapers* seemed to give clear indications that this right exists. Justice Stewart's position was that "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as

¹¹⁰ *Watkins*, *supra* note 64, at 5.

¹¹¹ See, e.g., *Herald Co.*, 734 F.2d at 100 (Second Circuit holding closure of a suppression hearing "should be invoked only upon a showing of a significant risk of prejudice to the defendant's right to a fair trial or of danger to persons, property, or the integrity of significant activities entitled to confidentiality, such as ongoing undercover investigations or detection devices."); *In re Globe Newspaper Co.*, 729 F.2d 47, 53 (1st Cir. 1984) (First Circuit requiring the trial court, for closure of bail proceedings, to "consider the nature and extent of publicity that the case is likely to arouse and determine whether alternatives less restrictive than closure will protect the accused's right to a fair trial."); *United States v. Chagra* 701 F.2d 354, 365 (5th Cir. 1983) (cited in *Herald Co.*, 734 F.2d at 99) (Fifth Circuit conditioning closure of a pretrial bail hearing on a showing of likely prejudice to a fair trial that cannot adequately be removed by alternatives and for which closure will probably be effective.); *United States v. Criden*, 675 F.2d 550, 561-62 (3d Cir. 1982) (Third Circuit permitting closure of a suppression hearing only upon findings "that other means will be insufficient to preserve the defendant's rights and that closure is necessary to protect effectively against the perceived harm."); *United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982) (quoting *Gannett Co. v. De Pasquale*, 443 U.S. 368, 399 (1979) (Powell, J., concurring)) (Ninth Circuit requiring an accused requesting closure of a suppression hearing to establish that it is "strictly and inescapably necessary in order to protect the fair-trial guarantee.").

well as criminal.”¹¹² Chief Justice Burger, in his plurality opinion which was joined by Justices White and Stevens, noted that, “[w]hether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.”¹¹³ Justice Brennan’s “‘structural’ approach to the resolution of First Amendment free speech and free press questions certainly supports the extension of the right to civil trials.”¹¹⁴ Justice Powell’s position supports a First Amendment right of the public to attend civil trials because “constitutional protection for access to information about governmental affairs surely provides some first amendment protection for access to civil judicial proceedings.”¹¹⁵

The comparison of interests between criminal and civil trials is not as disparate as one may think because there may be as much at stake for a civil litigant as a defendant’s interest in a criminal proceeding. This is succinctly summed up as follows:

[w]ith respect to public policy, civil trials are not categorically less important than criminal trials. A litigant’s interest in a civil proceeding may be as great as a defendant’s interest in a criminal proceeding. How does one weigh the multimillion-dollar civil suit against the thirty days-thirty dollars criminal case? In any event, the access right is the public’s and, therefore, the interest to be gauged is that of the public.¹¹⁶

This issue would be prevalent in litigation involving an aircraft accident. Wrongful death suits and claims for negligence in aviation accidents frequently result in claims of millions of dollars. More important, however, is the fact that the right that arises is the right of the public, not the right of the litigants. As stated earlier, the Supreme Court has not directly addressed the issue of a First Amendment right of the public to attend civil trials. This issue, however, has been addressed by the Second, Third, and Sixth Circuits.¹¹⁷

¹¹² *Richmond Newspapers*, 448 U.S. at 599 (Stewart, J., concurring).

¹¹³ *Id.* at 580 n.17.

¹¹⁴ G. Michael Fenner & James L. Koley, *Access To Judicial Proceedings: To Richmond Newspapers And Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 430 (1981).

¹¹⁵ *Id.* at 430-31.

¹¹⁶ *Id.* at 432.

¹¹⁷ See, e.g., *Brown & Williamson Tobacco Corp. v. Federal Trade Comm’n*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Westmoreland v. Columbia Broadcasting Sys., Inc.*, 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985).

The Sixth Circuit, in *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*,¹¹⁸ stated:

[T]he policy considerations discussed in *Richmond Newspapers* apply to civil as well as criminal cases. The resolution of private disputes frequently involves issues and remedies affecting third parties or the general public. The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases. Civil cases frequently involve issues crucial to the public—for example, discrimination, voting rights, antitrust issues, government regulation, bankruptcy, etc.¹¹⁹

Under this analysis, the rights of the public seem to be even more paramount. After an accident occurs there is often a great sense of fear regarding air travel. This is primarily due to the large number of fatalities that occur at once,¹²⁰ and as a result, the public may begin to unnecessarily question air safety.¹²¹ Any

¹¹⁸ 710 F.2d at 1165.

¹¹⁹ *Id.* at 1179 (citation omitted in original).

¹²⁰ Death rates from airline disasters can vary, but the death toll is typically very high. See Nat'l Transp. Safety Bd. Aircraft Accident Report 88/05 (155 people on board, 154 killed); Nat'l Transp. Safety Bd., Aircraft Accident Report 86/05, (1986) (163 people on board, 134 killed); Nat'l Transp. Safety Bd. Aircraft Accident Report 90/06 (1990) (296 people on board, 111 killed).

¹²¹ The United States Air Transportation System has an extremely low death rate, as evident by the following chart produced by The National Safety Council:

U.S. Civil Aviation Accidents, Death, and Death Rates, 1988-1992

Year	Accidents		Accident Rates Per 100,000 Aircraft-hours			Per Million Aircraft Miles	
	Total	Fatal	Deaths	Total	Fatal	Total	Fatal
	(include passengers, crew members and others)						
Large Airlines							
1988	29	3	285	0.251	0.018	0.0062	0.0004
1989	28	11	278	0.248	0.098	0.0061	0.0024
1990	26	6	39	0.214	0.049	0.0052	0.0012
1991	27	4	50	0.227	0.034	0.0056	0.0008
1992	19	4	33	0.155	0.033	0.0038	0.0008
Commuter Airlines							
1988	19	2	23	0.908	0.096	0.050	0.005
1989	18	5	31	0.803	0.223	0.046	0.013
1990	15	3	6	0.642	0.128	0.033	0.007
1991	22	8	77	1.013	0.368	0.058	0.021
1992	23	7	21	1.055	0.321	0.056	0.017
On-Demand Air Taxis							
1988	101	28	59	3.84	1.06	...	...
1989	111	25	83	3.68	0.83	...	...
1990	108	28	49	4.82	1.25	...	...
1991	88	26	73	3.93	1.16	...	...
1992	74	24	66	3.32	1.08	...	...

accident can be said to have an effect on third parties. The public will want to know what happened. It is not inconceivable that the public will be greatly influenced by the outcome of a trial involving an aircraft disaster. Perhaps the most important part of the Sixth Circuit's articulation in determining a First Amendment right of the public to attend civil trials is the public's interest in government regulation.¹²²

The Sixth Circuit noted that this right is not absolute.¹²³ The court stated that there are two broad categories of exceptions, "those based on the need to keep order and dignity in the courtroom and those which center on the content of the information to be disclosed to the public."¹²⁴ With reference to the first category, the Sixth Circuit stated: "Any such regulation must pass the following three-part test: that the regulation serve an important governmental interest; that this interest be unrelated to the content of the information to be disclosed in the proceeding; and that there be no less restrictive way to meet that goal."¹²⁵

The Second Circuit, in *Westmoreland v. Columbia Broadcasting System, Inc.*,¹²⁶ stated:

[W]e agree with the Third Circuit in *Publicker Industries* . . . that the First Amendment does secure to the public and to the press a right of access to civil proceedings in accordance with the dicta of the Justices in *Richmond Newspapers*, because public access to civil trials "enhances . . . the factfinding process," "fosters an appearance of fairness," and heightens "public respect for the judicial process," while permitting "the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self government."¹²⁷

General Aviation							
1988	2,368	460	800	8.69	1.68	...	...
1989	2,233	432	768	7.98	1.53	...	...
1990	2,218	445	763	7.78	1.56	...	...
1991	2,143	414	746	7.87	1.52	...	...
1992	1,956	408	812	7.19	1.50	...	...

Source: NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 96 (1993).

¹²² See *Brown & Williamson*, 710 F.2d at 1179.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985).

¹²⁷ *Id.* at 23 (citations omitted).

The issue confronting the Second Circuit, which the court subsequently declined to recognize, was whether there was a First Amendment right to televise civil proceedings.¹²⁸

In *Publicker Industries, Inc. v. Cohen*,¹²⁹ the Third Circuit held that “the First Amendment does secure a right of access to civil proceedings.”¹³⁰ The Third Circuit, in analyzing the Supreme Court’s decision in *Richmond Newspapers*, recognized that under the common law “the public’s right of access to civil trials and records is as well established as that of criminal proceedings and records.”¹³¹ The court based its holding on the analogy of the civil trial to the criminal trial. The court noted that the Supreme Court in *Richmond Newspapers* emphasized two features of the criminal justice system: (1) the criminal trial historically has been open to the press and general public, and (2) the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole.¹³² The Third Circuit in arriving at this decision concluded that:

[T]his survey of authorities identifies as features of the civil justice system many of those attributes of the criminal justice system on which the Supreme Court relied in holding that the First Amendment guarantees to the public and to the press the right of access to criminal trials in *Globe Newspaper Co. v. Superior Court* and *Richmond Newspapers, Inc. v. Virginia*. A presumption of openness inheres in civil trials as in criminal trials. We also conclude that the civil trial, like the criminal trial, “plays a particularly significant role in the functioning of the judicial process and the government as a whole.” From these authorities we conclude that public access to civil trial “enhances the quality and safeguards the integrity of the factfinding process.” It “fosters an appearance of fairness,” and heightens “public respect for the judicial process.” It “permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self government.” Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs. Therefore, we hold that the “First Amendment embraces a right of access to [civil] trials . . . to ensure that this constitutionally

¹²⁸ *Id.*

¹²⁹ 733 F.2d 1059 (3d Cir. 1984).

¹³⁰ *Id.* at 1061.

¹³¹ *Id.* at 1066.

¹³² *Id.* at 1068 (citing *Richmond Newspapers*, 448 U.S. at 605-06).

protected 'discussion of governmental affairs' is an informed one."¹³³

The Third Circuit's position in *Globe Newspaper* is important because it opens the door to recognition of the public's right of access to both civil proceedings and records.¹³⁴

IV. CONCLUSION

There can be little argument that the purpose of the 1990 Safety Board Act Amendments are striving to strike a balance between several parties: the pilots, the pilot's families, the litigants, the public, the press, and the desires of Congress. As with any balancing attempt, as priorities diverge so does the ability to keep harmony between the interested parties.

Is it in the public interest to have airplanes flown by crews that are afraid to communicate with each other? Indeed, crew coordination and the ability to work with one another helped to minimize fatalities of a disabled United Airlines DC-10.¹³⁵ Additionally, pilots already perform in an environment that is not only physically small, but that by nature brings with it much stress. The pilot's right to privacy must also be considered. The corollary to the pilot's privacy interests is the need of the media and the public to be aware of all developments in an area that affects so many people.

Is the playing field level when some of the litigants have participated in an investigation, the results of which are forbidden in the courtroom? Is it fair that some litigants will not be privy to the sacred contents of the cockpit voice recorder while their opponents may retain full knowledge of the CVR's contents?

Possible solutions to these questions would be worthy of a law review note. Because the primary objection to the release of CVR recordings is the potential for an invasion of privacy, perhaps the most reasonable solution would be to give all those involved an opportunity to defend their interests. The statute could be amended to initially provide for full disclosure to all litigants. The change could also require that notice be given to all parties whose voice is on the recording. If that person, their estate, or their representative desire, they will be given an opportunity to prove that the release of this portion of the CVR recording would constitute an invasion of their privacy. The

¹³³ *Id.* at 1070 (alteration in original) (citations omitted).

¹³⁴ *Id.* at 1066-69.

¹³⁵ Nat'l Transp. Safety Bd., Aircraft Accident Report 90/06 (1990).

proposed amendment could be structured to include a presumption that either favors the party seeking to protect their privacy interest or favors the party seeking disclosure.

With so much at stake it is difficult to speculate on the outcome of future litigation as it is affected by the 1990 Amendments. We will have to wait and see and "see and avoid."

